

Appln No. 10/664,643

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Reply to Office action of March 31, 2005

REMARKS/ARGUMENTS

Claims 6-20 are pending in the above-referenced application. Claim 21 has been added.

This is a response to the Final Office Action dated March 31, 2005 wherein the Examiner rejected claims 6-20 under §112, 2nd paragraph, for indefiniteness; rejected claims 12 and 20 under §102(b) as being anticipated by Owensby et al. (US 5,324,233); rejected claims 6-8 and 13 under §103(a) by Owensby in view of Smith et al. (US 5,176,634); and rejected claims 9, 14, and 15 under §103(a) by Owensby in view of Smith et al. and further in view of Larkin (US 4,608,043).

Following Applicants' Request for Reconsideration dated May 6, 2005 in which the grounds for rejecting the claims are addressed and the erroneous bases for the rejections clearly shown, the Examiner issued an Advisory Action simply stating "Applicant's remarks are not persuasive, the final rejection is maintained." Applicants are disappointed at the conclusory nature of the Advisory Action and request a telephone interview with the Examiner and his supervisor upon receipt by the Examiner of the present RCE and Second Request for Reconsideration.

Applicants have reproduced the Remarks set forth in the May 6th Request for Reconsideration below for a Second Request for Reconsideration. Among the errors committed by the is the fact that the comments regarding the §112, 2nd paragraph, was not addressed, failure to rebut the specification cited as proof that Owensby does not disclose the structure relied on by the Examiner, and failure to apply any prior art showing a channel

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disposed in a permanent seal and a sacrificial port sealed to a second seal spaced apart from the permanent seal.

TELEPHONE INTERVIEW REQUEST

Before the first action following the present RCE, Applicants respectfully request a telephone interview with the Examiner and his supervisor regarding the prior art and the claimed flexible container. A telephone interview is imperative in view of the dispute between the Examiner and Applicants as to the structure of the container disclosed by Owensby. Applicants' undersigned attorney can be reached at 949-476-0757, between 7:30 am to 6:30 pm Pacific Time.

The following remarks are identical to the remarks set forth in Applicants' May 6th Request for Reconsideration.

§112, 2nd Paragraph, Rejection of Claims 6-20

In rejecting claims 6-20 under §112, 2nd paragraph, the Examiner contends that "[t]he second seal is a different seal that cooperates with the permanent seal to form a closed container for aseptic filling; therefore, the second seal cannot be spaced apart from the permanent seal."

Applicants respectfully submit that the claims are properly recited and the Examiner's rejection of the claims is proof that the Examiner failed to appreciate the scope being sought in connection with the rejection of the claims under §102(b) and §103(a), as further discussed below.

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With reference to FIGs. 6 and 8 of the instant application, the two containers 10, 10a shown are nearly identical with the exception of the two additional compartments 22, 23, and peelable seals 25, 26 incorporated in container 10 and not container 10a. In both containers, a permanent seal is formed around the perimeter of the container, including a seal along a right edge fixedly holding the two sacrificial ports 72, 74 and a lower edge fixedly holding the outlet port 30.

Just left of the right edge is another seal (shown without element numbering) parallel to the left edge and the right edge. This middle seal, call it a final perimeter seal, is spaced apart from the right edge. This final perimeter seal has two open channels just above and below and in fluid communication with the two sacrificial ports 72, 74.

In practice, fluids are filled in the container through the two sacrificial ports. The final perimeter seal is then completed by applying one or more heat dies to seal off the two open channels. The section of the container to the right of the final perimeter seal along with the two sacrificial ports are then severed and disposed. The final configuration of the container of FIG. 6 is shown in FIG. 1 and the final configuration of the container of FIG. 8 is shown in FIG. 17.

Hence, Applicants submit that the phrase "a second seal spaced apart from the permanent seal" in claims 6-20 is proper and in compliance with the requirements of §112, 2nd paragraph. As discussed above, the claimed flexible container incorporates a permanent seal and a second seal spaced apart from the

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permanent seal. Reconsideration and a notice of allowance are respectfully requested.

The preamble of claims 6, 12, and 20 have been amended to more correctly identify the article for the subject matter of claims 6, 12, and 20, i.e., a flexible container. Applicants submit that the amendments do not change the scope of the claims or raise any new patentability issue. Moreover, MPEP §2173.02 encourages the proposed amendments when it is clear that the claims are directed to patentable subject matter.

§102(b) Rejection of Claims 12 and 20 by Owensby

In rejecting claims 12 and 20, the Examiner contends that: Owensby discloses a method for forming flexible container including the steps of: providing a front and rear sheets made of vapor impermeable transparent flexible ethylene propylene copolymer film (42) (col. 5, lines 15-45) suitable for medical solution; heating the front and rear sheets with a peripheral sealing means (31) to form permanent peripheral seals defining bottom (52) and sides (51) of a pouch (50) (col. 7, lines 59-63) while a top end (54) remains open and forms a gap for providing a channel between the front and rear sheets to receive a filling port; and providing a port (53) interposed between the front and the rear sheets and in communication with a channel in the top end of the pouch, wherein the filling ports is attached to the front and rear sheets by a second seal (col. 7, line 64 - col. 8, line 13). Note that the

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opening in the top end (54) is sealed together, with the filling port (53) interposed between the first and second sheets, by sealing bars (10) in a port sealing means (38) and the second seal is spaced apart from the permanent seal which comprises the bottom (52) and the sides (51) of the pouch (50). Regarding the limitation of the port being "sacrificial," the claimed method does not include any step of removing and/or destructing the port; therefore, the claimed "sacrificial port" is considered as a conventional filling or dispensing port.

For a reference to anticipate the claimed invention under §102(b), it alone must disclose each and every element of the claimed invention. Applicants submit that Owensby failed to satisfy this requirement.

Independent claim 12 recites a method for forming a flexible container, the method comprising the steps of: providing a flexible, transparent front sheet; providing a flexible, vapor impermeable rear sheet; heating the front and rear sheets in a first localized area to fuse together the heated portions of the adjoining surfaces, thereby forming a permanent seal around a portion of a common peripheral edge of said front and rear sheets, the permanent seal having at least one gap therein providing a channel between said front and rear sheets; and providing at least one sacrificial port interposed between the front and rear sheets and in communication with the channel for aseptically filling the container, the at least one

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sacrificial port attached to the front and rear sheets by a second seal spaced apart from the permanent seal.

It is clear from the rejection the Examiner either miscomprehend the claimed invention and/or the Owensby reference for what it teaches. For example, the Examiner contends that Owensby discloses a container having a top end (54) remaining open to form a channel ("...while a top end (54) remains open and forms a gap for providing a channel between the front and rear sheets to receive a filling port; and providing a port (53) interposed between the front and the rear sheets and in communication with a channel in the top end of the pouch, wherein the filling ports is attached to the front and rear sheets by a second seal (col. 7, line 64 - col. 8, line 13)..."). The Examiner cited the passage from col. 7, line 64 to col. 8 line 13 but conveniently leaves out critical information within the cited passage and information that follows, i.e., Col. 8, line 13 to Col. 8, line 33. The description on Col. 8, line 9 to Col. 8, line 33 of the '233 Owensby et al. reference is reproduced below verbatim:

Next the indexing means 37 moves the flexible film pouches with inserted fitment tubes to port seal means 38 where the sealing of the fitment tubes and the open top end of the pouches is accomplished using sealing means 10 (not shown). The indexing means 37 then cycles the flexible film pouches with fitment tubes through at least one cooling means station 39 and finally to a product ejection means 40. At this point the platten means 35 returns to the fitment loading

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means 36 and the cycle repeats. It is to be appreciated from FIG. 3 that there preferably are as many platten means 35 as there are stations so that the process is a continuous automated one, as is well understood in the art. It is also to be appreciated that fitments may be attached to the ends of the fitment tubes during the automated process after sealing of the fitment tubes is accomplished as is also well understood in the art.

While the present invention has been shown where the flexible film pouches are made and fitment tubes sealed thereto and then filled with a product at a later time it is to be appreciated that the pouches may be filled immediately after completion of the fitment sealing operation and further that the pouches may be made in a vertical position and filled either before or after the fitment tubes are sealed into place. (Col. 8, line 9 to Col. 8, line 33, emphasis added).

It is clear from foregoing passage that the open top 54 is left open only for a moment while the fitment tube loading means 36 is rotated so that the mandrel 34 can insert the fitment tubes into the open end 54. Once the fitment tubes are inserted into the open end 54, the sealing of the fitment tubes and the open top end of the pouches is accomplished using sealing means 10 (not shown). In other words, Owensby does not disclose a channel in communication with a sacrificial port for aseptically

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filing the container after the sealing means 10 is applied. Once the open top 54 is sealed for aseptic filling, the fitmen tubes 53, even if they are considered sacrificial ports, are not in communication with the channel as there is no longer any open channel.

Thus, applicant submits that Owensby cannot anticipate claim 12 by disclosing each and every element of claim 12. Among other things, Owensby does not disclose a method for forming a flexible container, that includes providing at least one sacrificial port interposed between the front and rear sheets and in communication with the channel.

The Examiner is trying to have it both ways by contending that Owensby discloses an open top end 54 while also stating that "Note that the opening in the top end (54) is sealed together, with the filling port (53) interposed between the first and second sheets, by sealing bars (10) in a port sealing means (38) and the second seal is spaced apart from the permanent seal which comprises the bottom (52) and the sides (51) of the pouch (50)." In other words, the open top end (54) is relied on to disclose two elements: (1) as a channel and (2) as a second seal spaced apart from the permanent seal, "which comprises the bottom (52) and the sides (51) of the pouch (50)." The two items are in complete contradiction. This is impermissible and unreasonable under any standard.

Additionally, the Owensby reference cannot anticipate claim 12 as it does not disclose the at least one sacrificial port attached to the front and rear sheets by a second seal spaced apart from the permanent seal. Owensby only discloses a single



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permanent seal and not a second seal spaced apart from the permanent seal.

Reconsideration and a notice of allowance are respectfully requested.

Regarding claim 20, it recites a method for forming a flexible container, the method comprising the steps of: providing a flexible, transparent front sheet; providing a flexible, vapor impermeable rear sheet; heating the front and rear sheets in a first localized area to fuse together the heated portions of the adjoining surfaces, thereby forming a permanent seal around a portion of a common peripheral edge of said front and rear sheets, the permanent seal having at least one gap therein providing a channel between said front and rear sheets; providing at least one sacrificial port interposed between the front and rear sheets and in communication with the channel for aseptically filling the container, the at least one sacrificial port attached to the front and rear sheets by a second seal spaced apart from the permanent seal; and providing at least one outlet port interposed between the front and rear sheets and attached to the front and rear sheets by the permanent seal.

Applicants submit that claim 20 is similar in scope as claim 12 and recites, in part, a method for forming a flexible container comprising the step of providing at least one sacrificial port interposed between the front and rear sheets and in communication with the channel for aseptically filling the container, the at least one sacrificial port attached to the front and rear sheets by a second seal spaced apart from the

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permanent seal. Accordingly, claim 20 is allowable over Owensby for at least the same reasons as claim 12. Reconsideration and a notice of allowance are respectfully requested.

§103(a) Rejection of Claims 6-8 and 13 by Owensby in view of  
Smith

In rejecting claim 6, the Examiner contends that Owensby discloses a method for forming a container essentially as recited "but lacks the specific teaching of the front sheet comprising polypropylene-polyethylene co-polymer blended with styrene ethylene-butylene styrene elastomer." However, the Examiner contends that use of such material for a flexible container is well known in the art as taught by Smith and therefore "it would have been obvious to an ordinary skilled person in the art. . .to have modified the method of Owensby by having provided the specific polypropylene-polyethylene co-polymer blended with styrene ethylene-butylene styrene elastomer of Smith for the front sheet and/or the rear sheet since such material is well known in the art for forming flexible container containing solution."

Preliminarily, for a §103(a) rejection, (1) the applied references must either alone or in combination teach each and every elements of the claimed invention; (2) there must be a suggestion, motivation, or teaching for the proposed modification; and (3) the ination must have a reasonable expectation of success. MPEP §2143. The teaching or suggestion to make the claimed combination and the reasonable expectation

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of success must both be found in the prior art and not in applicants' disclosure. *Id.*

Independent claim 6 recites a method for forming a flexible container, the method comprising the steps of: providing a flexible, transparent front sheet comprising a polypropylene-polyethylene co-polymer blended with styrene ethylene-butylene styrene elastomer; providing a flexible, vapor impermeable rear sheet; heating the front and rear sheets in a first localized area to fuse together the heated portions of the adjoining surfaces, thereby forming a permanent seal around a portion of a common peripheral edge of said front and rear sheets, the permanent seal having at least one gap therein providing a channel between said front and rear sheets; and providing at least one sacrificial port interposed between the front and rear sheets and in communication with the channel for filling the container, the at least one sacrificial port attached to the front and rear sheets by a second seal spaced apart from the permanent seal.

Claim 6 is similar to claim 12, discussed above, in that it recites a flexible container comprising a permanent seal having at least one gap therein providing a channel between said front and rear sheets; and providing at least one sacrificial port interposed between the front and rear sheets and in communication with the channel for filling the container. Claim 6 also recites at least one sacrificial port attached to the front and rear sheets by a second seal spaced apart from the permanent seal. Owensby does not disclose a gap defining a channel as recited and as discussed above with reference to

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independent claim 12. Owensby also does not disclose a second seal spaced apart from the permanent seal.

Smith does not make up for Owensby's shortcomings as Smith is relied on for disclosing a certain type of material for a flexible sheet. Accordingly, Owensby and Smith, alone and in combination, do not disclose each and every elements of the claimed invention as required under §103(a). Reconsideration and a notice of allowance are respectfully requested.

Because claims 7 and 8 depend from claim 6, they are allowable for the same reasons as claim 6.

Claim 13 depends from claim and is therefore allowable for the same reasons as claim 12.

§103(a) Rejection of Claims 9, 14, and 15 by Owensby, Smith and Larkin

Claims 9 depends from independent claim 6 and claims 14 and 15 depend from claim 12, accordingly, they are allowable over the cited references for the same reasons as discussed above for independent claims 6 and 12. Reconsideration and a notice thereof are respectfully requested.


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In view of the foregoing remarks and amendments, it is thought that the application is now in condition for allowance and early notice thereof is respectfully requested.

Should the Examiner finds it necessary to speak with Applicants' attorney, he is invited to contact the undersigned at the telephone number indicated below.

Respectfully submitted,  
CHRISTIE, PARKER & HALE, LLP

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